ORIGINAL

No. 96-355

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Arthur Calderon, Petitioner

v.

Michael Angelo Morales, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

David A. Senior*
CONDON & FORSYTH
1900 Avenue of the Stars
Suite 650
Los Angeles, California 90067
Telephone: (310) 557-2030
Attorneys for Respondent
Michael A. Morales

* Counsel of Record

23 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iii
QUESTION PRESENTED	2
RESPONDENT'S BRIEF IN OPPOSITION	3
STATEMENT OF THE CASE	3
1. Nature of the Case	3
2. The Course of Proceedings	3
3. Disposition in the Court Below	9
REASONS WHY THE PETITION SHOULD BE DENIED	10
1. "Adequacy" and State Procedural Defaults	11
2. This Appeal Does not Involve an Important Question of Federal Law Which Must be Settled by This Court	14
3. There are no Conflicts in the Courts Below	15
4. Federalism and Comity Do Not Permit Arbitrary and Haphazardly Applied, Albeit Facially Constitutional, State Rules of Procedure to Bar Federal Habeas Corpus Review	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	PAGE
Barr v. City of Columbia, 378 U.S. 146 (1964)	14
Breest v. Perrin, 655 F.2d 1 (1st Cir.), cert. denied, 454 U.S. 1059 (1981)	15
Cochran v. Herring, 43 F.3d 1404 (11th Cir. 1995)	16
Coleman v. Thompson, 501 U.S. 722 (1991)	11, 18, 19
County Court of Ulster County v. Allen, 442 U.S. 140 (1979)	12, 18
Dugger v. Adams, 489 U.S. 401 (1989)	12, 14, 17
Ford v. Georgia, 498 U.S. 411 (1991)	13, 17
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	11
Grubbs v. Delo, 948 F.2d 1459 (8th Cir. 1991), cert. denied, ___ U.S. ___, 113 S. Ct. 109 (1992)	15
Harris v. Reed, 489 U.S. 255 (1989)	11, 12, 17, 19
Hathorn v. Lovorn, 457 U.S. 255 (1982)	13, 14, 18
Herndon v. Georgia, 295 U.S. 441 (1935)	11
Hill v. Black, 932 F.2d 369 (5th Cir. 1991)	15
Howlett v. Rose, 496 U.S. 356 (1990)	16
Johnson v. Mississippi, 486 U.S. 578 (1988)	12, 17
Klein v. Neal, 45 F.3d 1395 (10th Cir. 1995)	16
Klinger v. Missouri, 80 U.S. (13 Wall.) 257 (1872)	11
Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996)	2, 9, 17
McCleskey v. Zant, 499 U.S. 467 (1991)	7

People v. Morales, 48 Cal. 3d 527 (1989) 4

Reynolds v. Ellingsworth, 843 F.2d 712 (3d Cir.), cert. denied, 488 U.S. 960 (1988) 15

Rosa v. Peters, 36 F.3d 625 (7th Cir. 1994) 15

Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995) . . 8, 16

Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 129 (1994) 15

In re Stankewitz, 40 Cal. 3d 391 (1985) 7

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 12, 18

Wainwright v. Sykes, 433 U.S. 72 (1977) 11, 18

Warner v. United States, 975 F.2d 1207 (6th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1314 (1993) . . 15

Wedra v. LeFevre, 988 F.2d 334 (2d Cir. 1993) 15

STATUTES

28 U.S.C. § 1292(b) 8

28 U.S.C. § 2254 . . . . . 3, 14

California Penal Code § 187 3

California Penal Code § 190.3(a)(15)] 4

MISCELLANEOUS

16 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction § 4025 (1977) . . . 18

D. Fisher & R. Lynn, Appeals and Writs in Criminal Cases § 2.116 (C.E.B. 1982) . . . 4

QUESTION PRESENTED

Whether this Court should restructure the procedural default doctrine so that a state court's arbitrary application of certain discretionary procedural "guidelines" may be deemed adequate and independent to bar federal habeas review.[1]

---

[1] The California Supreme Court's timeliness guidelines are set forth in Morales v. Calderon, 85 F.3d 1387, 1390 (9th Cir. 1996), and in the petition at Appendix C.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Michael A. Morales (hereinafter "Morales") respectfully requests that the Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeals for the Ninth Circuit that reversed the district court's order dismissing, on procedural grounds, every extra-record habeas corpus claim raised by Morales.

The opinion of the Court of Appeals reversing the district court's order is reported at Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996). The district court's order is not reported, but is printed as Appendix B to the petition.

STATEMENT OF THE CASE

1. Nature of the Case.

This action involves a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising numerous federal constitutional challenges to the conviction and sentence of death received by Morales in the Superior Court of the State of California, County of Ventura, in 1983.

2. The Course of Proceedings.

On June 14, 1983, Morales was sentenced to death following his conviction for one count of first degree murder [Cal. Penal Code § 187], with the special circumstance of lying

in wait [Cal. Penal Code § 190.3(a)(15)].[2] On February 22, 1984, the California Supreme Court appointed counsel "to represent appellant on his automatic appeal now pending in this court." People v. Morales, Crim. No. 23153 (Cal. Feb. 22, 1984) (minute order).[3] The judgment and sentence were affirmed on appeal, People v. Morales, 48 Cal. 3d 527 (1989), and the state supreme court's remittitur issued on June 1, 1989.

Five days later, the California Administrative Office of the Courts issued a news release entitled "Supreme Court Adopts Policies Regarding Cases Arising From Judgments of Death." A.O.C. News Release # 40 (June 6, 1989). Included among these "policies" were a set of Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions. Under the provisions of Standard 1, entitled "Timeliness Standards," the scope of appellate appointments was expanded, apparently retroactively as well as prospectively, to include the

---

[2] The trial court vacated a torture-murder special circumstance finding for lack of evidence. On appeal, the California Supreme Court reinstated the finding. People v. Morales, 48 Cal. 3d 527, 562 (1989).

[3] Appointment orders entered at that time did not refer to habeas corpus proceedings because habeas primarily was a post-affirmance remedy at that time. See generally D. Fischer & R. Lynn, Appeals and Writs in Criminal Cases § 2.116 (C.E.B. 1982). Because California shifted to a "unitary" appeal and habeas system after the affirmance in Morales's case, current appointment orders typically state that counsel is "appointed to represent appellant on his automatic appeal now pending in this court, including any related habeas proceedings." See, e.g., People v. Dent, No. S024645 (Cal. Jan. 20, 1995); People v. Sapp, No. S023628 (Cal. Jan. 19, 1995).

"duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus." For reasons not clear from the record, counsel never filed a petition for writ of habeas corpus on Morales's behalf,[4] and Morales's first and only state-court petition was filed only after appointment of new counsel in federal court.[5]

On April 24, 1991, the district court granted Morales's request for appointment of counsel to prosecute a federal habeas corpus proceeding on his behalf, and appointed present counsel, who had not represented Morales in state court proceedings. On July 20, 1992, counsel filed in the district court a petition for writ of habeas corpus consisting of 52 claims. Twenty of these were claims exhausted during Morales's automatic appeal and raised legal issues based solely on the trial record. The remaining 32 claims were based on facts outside the trial record

---

[4] In a declaration filed in the California Supreme Court in February 1993, counsel stated that "[a]t the time I received [my] appointment, it was my understanding and belief that issues or claims to be set forth in petitions for writ of habeas corpus could be filed, if necessary, upon the conclusion of the direct appeal proceedings. . . . [B]ecause I never sought appointment to represent Mr. Morales in habeas corpus proceedings . . . I never have believed that I was counsel of record for Mr. Morales with respect to such proceedings. It always has been my understanding that a petition for writ of habeas corpus would be a separate proceeding with a separate case number, and hence a different action which would require a separate proceeding appointing counsel on Mr. Morales' behalf."

[5] Morales was not the only condemned petitioner in this position. His state-court petition was preceded by three others in the same posture. See In re (Gary) Howard, S013984; In re McClain, S020204; In re (Calvin) Coleman, S023949, each of which, as discussed, infra, was treated as timely by the California Supreme Court.

and were discovered by present counsel after his federal court appointment to the case.

On November 16, 1992, the district court dismissed the 32 unexhausted extra-record claims without prejudice and ordered Morales to present the claims to the California Supreme Court within thirty days. On December 16, 1992, Morales filed these claims (and an additional, newly-discovered claim) in a first petition for writ of habeas corpus in the California Supreme Court. On April 19, 1993, before the State filed an informal response to the petition, Morales filed a supplement to that petition containing newly-discovered facts for three previously filed claims, and adding three claims that were discovered since the original filing. This amendment to the petition was docketed under a second case number.

The State opposed each and every one of Morales's claims on timeliness grounds, asserting that the supporting facts could have been discovered during the pendency of the automatic appeal, despite the duty to investigate being imposed after Morales's direct appeal was over. Despite the California Supreme Court's prior history of treating habeas corpus petitions filed in this procedural posture as timely, see In re (Gary) Howard, S013984 (Cal. Sept. 20, 1990)[6]; In re (Calvin) Coleman, S023949

---

[6] Newly-appointed federal counsel filed petitioner's first state-court petition for writ of habeas corpus approximately one year after federal-court appointment.

(Cal. Jun. 10, 1992)[7]; In re McClain, S020204 (Cal. Jan. 13, 1993)[8], on July 28, 1993, the California Supreme Court denied Morales all relief, issuing identically-worded orders under each case number, which read: "Petition for writ of habeas corpus denied on the merits and as untimely. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn. 1.)"[9]

The next day, the California Supreme Court issued its decision in In re Clark, 5 Cal. 4th 750 (1993), in which a review of the "law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus" led the court to a simple, but important, conclusion: "no clear guidelines have emerged in our past cases." Id. at 763. The Clark court then announced, apparently reversing the view evidenced by the orders in Coleman, Howard, and McClain, supra, that federal change of counsel is irrelevant to questions of timeliness, as is the result of a federal investigation undertaken "in response to McCleskey [v. Zant, 499 U.S. 467 (1991)]." Id. at 775.

Thereafter, Morales filed a first amended petition in

---

[7] Newly-appointed federal counsel filed petitioner's first state-court petition for writ of habeas corpus approximately one year after federal-court appointment.

[8] Newly-appointed counsel filed petitioner's first state-court petition for writ of habeas corpus one year and four months after federal-court appointment.

[9] In addition, Justice Mosk dissented as to one of the orders, stating that "an order to show cause should issue."

the district court, which included these 36 newly-exhausted claims, plus two more claims attacking the constitutionality of the California death penalty statute. On April 11, 1994, the State moved to dismiss the amended petition on grounds of procedural default. The district court granted the motion and, on April 29, 1994, entered an order finding the state supreme court's invocation of the timeliness policy to be an "adequate and independent" state ground for decision, and dismissing the 37 [sic 38] newly-exhausted claims in Morales's first amended petition with prejudice. Petition for Writ of Certiorari, Appendix B. The district court granted Morales leave to brief the "cause and prejudice" and "fundamental miscarriage of justice" exceptions to the procedural default doctrine. Id. at 9.

On August 18, 1994, Morales moved for reconsideration of the dismissal on authority of Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), which was decided after the district court's initial decision. The district court denied reconsideration, but granted a request to certify the issue for interlocutory appeal, which was heard concurrently with the motion for reconsideration, and was granted unopposed.

On October 11, 1994, Morales sought permission from the Court of Appeals to file an interlocutory appeal pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1292(b). The Ninth Circuit granted permission to appeal, and subsequently reversed.

3. Disposition in the Court Below.

On June 4, 1996, the Ninth Circuit Court of Appeals reversed the district court's order, holding that the California state policies regarding the timely filing of habeas corpus petitions in cases arising from judgments of death were not adequate to bar federal review of constitutional claims. Relying in part on a concession by the California Supreme Court that "'no clear guidelines [regarding departure from the habeas corpus rules] have emerged in our past cases'" (Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996)(quoting In re Clark, 5 Cal. 4th 750, 763 (1993))), the Ninth Circuit found "so much variation in application of California's timeliness requirements . . . that no discernible clear rule then existed . . . ." Id. at 1391. In this regard, because "California's rule on timeliness was not 'clear, consistently applied, and well-established' at any time after Morales's convictions were affirmed and before he filed his first state habeas petition" (citation omitted), the rule "cannot serve as an adequate and independent state ground sufficient to support a procedural default." Id. at 1393.

On August 30, 1996, the State filed a petition for writ of certiorari, which was placed on this Court's docket on September 9, 1996, seeking review of the decision of the Court of Appeals.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court of Appeals properly determined that the state court's invocation of its timeliness "policies" to deny in its entirety Morales's first and only petition for writ of habeas corpus was "inadequate" to bar federal court review. The timeliness policies are impermissibly vague, entirely discretionary, and applied arbitrarily and haphazardly, and were used for the first time in Morales's case to reach a wholly unprecedented result. Under long-standing doctrine of this Court, each of these reasons, considered individually, compels the conclusion that Morales is not barred from federal habeas corpus review of his claims.

The State's request for a complete overhaul of the adequate and independent state ground doctrine as it applies to federal habeas corpus should be rejected. This Court consistently has held that the only difference between the application of the doctrine to direct review cases and habeas cases is that it is applied more leniently in habeas corpus, not more rigidly as the State would have it. The State's "pre-emption" formulation of the doctrine for habeas corpus would render it a virtual nullity and upset this Court's carefully constructed balance of comity by allowing even the most arbitrary state procedural rules to bar federal court review.

/ /

1. **"Adequacy" and State Procedural Defaults.**

Under the adequate and independent state ground doctrine, this Court has no jurisdiction on direct review over a state court decision resolving federal questions if the judgment rests on a state law ground that is "independent" of the federal question and "adequate" to support the judgment. See, e.g., Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872). Procedural as well as substantive rules can function adequately and independently. See, e.g., Herndon v. Georgia, 295 U.S. 441 (1935).

The procedural default doctrine governing federal habeas corpus cases is derived from this doctrine, see Wainwright v. Sykes, 433 U.S. 72 (1977); Coleman v. Thompson, 501 U.S. 722 (1991), and is applied in the same fashion, Harris v. Reed, 489 U.S. 255 (1989), with one important difference. The doctrine governing direct review regarding the restriction is jurisdictional, whereas the doctrine governing habeas is merely jurisprudential. Coleman v. Thompson, 501 U.S. at 730-31; Wainwright v. Sykes, 433 U.S. at 83. Thus, the habeas corpus decisions of this Court repeatedly emphasize that a state procedural default will bar federal habeas corpus relief only where the state ground for decision is "adequate," see, e.g., Harris v. Reed, 489 U.S. at 261-62; Coleman v. Thompson, 501 U.S. at 736 ("federal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds"), and cite

without hesitation direct review cases setting forth these criteria for judging adequacy. See, e.g., Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989) (discussed infra); Harris v. Reed, 489 U.S. at 261 n.6 (expressly incorporating the Johnson v. Mississippi, 486 U.S. 578 (1988), "even-handed application" test of adequacy that was applied by the Ninth Circuit in the instant case.)

Throughout these proceedings, Morales has argued numerous challenges to the California Supreme Court's invocation of a procedural bar in his case: (1) the timeliness requirements under state law are utterly vague and confusing; (2) the timeliness policies, devoid of any reference to objective criteria, are wholly discretionary; (3) the state court applies the timeliness policies in a seemingly arbitrary and haphazard manner; (4) the procedural requirement was not in effect at the time of the alleged default, as the policies were adopted after Morales's appeal was decided; and (5) the policies were applied in a new and unexpected manner in Morales's case in that each of the three state court habeas petitions filed by the petitioners in the same procedural posture as Morales were deemed timely filed. Each of these challenges finds authoritative support in the decisions of this Court. See, e.g., County Court of Ulster County v. Allen, 442 U.S. 140, 150 (1979) (federal review not barred where state "ha[d] no clear contemporaneous-objection policy that applie[d] in this case"); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969); Johnson v. Mississippi,

486 U.S. 578, 588-89 (1988) ("[W]e cannot conclude that the procedural bar relied on by the [state court] in this case has been consistently or regularly applied. Consequently, under federal law it is not an adequate and independent state ground for affirming petitioner's conviction." (footnote omitted)); Hathorn v. Lovorn, 457 U.S. 255, 263 (1982)("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."); Ford v. Georgia, 498 U.S. 411, 423 (1991)(quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958))("'Novelty in procedural requirements cannot be permitted to thwart review . . . applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights'").

The State now abandons all contentions that the procedural bar imposed in Morales's case passes the criteria for "adequacy" articulated in these decisions, and instead petitions for a writ of certiorari to eliminate the asserted uncertainty regarding "adequacy" and the procedural default doctrine and/or to refashion the doctrine to include only the lone test it believes that the bar can pass: constitutionality of the state procedure. For the reasons set forth below, the State's petition for certiorari on these grounds should be denied.

/ /

/ /

2. This Appeal Does not Involve an Important Question of Federal Law Which Must be Settled by This Court.

A petition for writ of certiorari regarding the assessment of whether a state procedural rule is clear and regularly enforced does not involve an important question of federal law which must be resolved by this Court. The State incorrectly proffers that this case presents a unique opportunity for the Court to decide whether the adequacy of a state procedural rule in a habeas corpus case should be measured by whether the rule is "consistently or regularly applied"; to wit, the standard uniformly applied by this Court in determining the adequacy of a state procedural rule. See, e.g., Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982); Barr v. City of Columbia, 378 U.S. 146, 149 (1964). No unique opportunity exists in this regard in that this Court already has held, in a habeas corpus case, that an adequate state rule used to bar federal review must be consistently or regularly applied. Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989).[10] The use of this standard by the Court wholly undermines the State's contention that this Court needs to

---

[10] Petitioner incorrectly contends that this Court never has applied the "consistently and regularly applied" adequacy standard to a 28 U.S.C. § 2254 case, and rejected this standard in Dugger. Petition at 16 n.4. In fact, this Court did not reject this standard, but applied the standard in denying respondent relief, noting that the Florida state court faithfully applied its procedural rule with only a few exceptions. By contrast, the Court of Appeals noted in this case, without dispute by petitioner, that the California Supreme Court did not "consistently and regularly" enforce its rule; but applied the rule only in the breach, with respondent's case being one of the few applications. Morales, 85 F.3d at 1391.

consider whether this well established and uniformly applied standard should be applied to habeas corpus cases. The Court's application of the "consistently applied" and "regularly followed" standard in Dugger has created a uniform application of this adequacy test by all lower courts.

In this regard, no issue set forth in the petition remains unanswered by the Court, and no confusion has occurred with respect to the lower courts' understanding and application of this adequacy test. Accordingly, the petition should be denied.

3. There are no Conflicts in the Courts Below.

Remarkably absent from the State's analysis is that, consistent with the Court of Appeals' decision in this case, every federal circuit has stated in a habeas corpus proceeding that only those state rules that are consistently enforced are adequate to support a finding of procedural default. See Breest v. Perrin, 655 F.2d 1, 3 (1st Cir.), cert. denied, 454 U.S. 1059 (1981); Wedra v. LeFevre, 988 F.2d 334, 340 (2d Cir. 1993); Reynolds v. Ellingsworth, 843 F.2d 712, 719 (3d Cir.), cert. denied, 488 U.S. 960 (1988); Smith v. Dixon, 14 F.3d 956, 972 (4th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 129 (1994); Hill v. Black, 932 F.2d 369, 373 (5th Cir. 1991); Warner v. United States, 975 F.2d 1207, 1213 (6th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1314 (1993); Rosa v. Peters, 36 F.3d 625, 633 (7th Cir. 1994); Grubbs v. Delo, 948 F.2d 1459, 1463

(8th Cir. 1991), cert. denied, ___ U.S. ___, 113 S. Ct. 109 (1992); Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995); Klein v. Neal, 45 F.3d 1395, 1398 (10th Cir. 1995); Cochran v. Herring, 43 F.3d 1404, 1408 (11th Cir. 1995). No circuit ever has rejected consistency of application as a test of adequacy.

The State even conceded before the Court of Appeals that evenhandedness is relevant to adequacy; however, it claimed that this Court prefers consistency only in situations where an identifiable federal right preempts a state rule or where application of the state rule specifically works to evade federal questions.[11] The State thereby attempts to swallow the consistency requirement within its narrow scheme predicated entirely on a misreading of Howlett v. Rose, 496 U.S. 356 (1990).

In Howlett, this Court simply reversed the judgment of the state court on the ground that the state court's "refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." Id. at 375. Howlett did not involve the jurisdiction of a federal court to review a federal question forfeited in state court, but only the duty of a state court to entertain a federal claim in the first instance. Howlett also did not involve the infinity of federal challenges to state-court rules, but only Supremacy Clause challenges. Far from the facts that exist here, the Court of Appeals correctly

---

[11] See Appellee's Brief at 31.

noted that the State's reliance upon Howlett was inapposite. Morales v. Calderon, 85 F.3d at 1391-92.

The requirement of consistency rests on a less esoteric principle than that advanced by the State; namely, that litigants should understand binding rules. They should not lose their day in federal court because of rules, such as California's timeliness requirements, that are haphazardly applied. The consistency criterion arose because judges were concerned that state judges would arbitrarily erect obstacles to avoid federal questions. Courts understood that judges would never admit such a motive, so consistency became a kind of proxy for determining whether judges were discriminating. But that is not to say that the consistency requirement has no other rationale. This Court frequently requires consistency without regard to possible federal right preemption or evasion. See Johnson v. Mississippi, 486 U.S. 578, 586 (1988). For these reasons, the petition should be denied.

4. Federalism and Comity Do Not Permit Arbitrary and Haphazardly Applied, Albeit Facially Constitutional, State Rules of Procedure to Bar Federal Habeas Corpus Review.

With this petition for writ of certiorari, the State seeks to set aside the myriad decisions of this Court - Ford v. Georgia, 498 U.S. 411 (1991); Dugger v. Adams, 489 U.S. 401 (1989); Harris v. Reed, 489 U.S. 255 (1989); Johnson v.

Mississippi, 486 U.S. 578 (1988); Hathorn v. Lovorn, 457 U.S. 255 (1982); County Court of Ulster County v. Allen, 442 U.S. 140 (1979); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) - in favor of the creation of what it terms the "pre-emption formulation." Under its view of the law, all state procedural grounds for decision would be deemed "adequate" in habeas corpus cases unless the application of the state rule constituted an independent constitutional violation.

Simply stated, this is a misguided view of what the law is, or ought to be. "State grounds may be found inadequate without descending to a denial of due process." 16 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction § 4025 (1977). Indeed, it appears that the State's real request is for this Court to conflate the separate requirements of adequacy and independence. "[S]tate procedure can never be independent of the requirements of due process. There would be . . . jurisdiction to review a state decision that refused consideration of any claim, state or federal, on procedural grounds that fell below due process requirements." Id.

The State has identified no reason that the requirement of an "adequate" state ground for decision be eliminated (or virtually eliminated) from habeas corpus cases. The governing principles of comity and federalism are the same in both instances. See Wainwright v. Sykes, 433 U.S. 72 (1977). "Faced with a common problem, we adopt[ed] a common solution." Coleman v. Thompson, 501 U.S. at 734 (quoting Harris v. Reed, 489 U.S. at

263). This Court traditionally has rebuffed attempts to apply the independent and adequate state ground doctrine more deferentially in habeas corpus proceedings than on direct review, see Harris v. Reed, 489 U.S. at 255, for the very sound reason that the doctrine, as applied in habeas corpus proceedings, is non-jurisdictional. Coleman v. Thompson, 501 U.S. at 730-31.

Nothing in doctrines of comity or federalism permits the barring of federal habeas corpus review by arbitrary, haphazard, or otherwise "inadequate" state court grounds for decision. This Court should reject the State's attempt to rewrite the rules of federal procedure to do just that. The petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondent Michael A. Morales respectfully requests that this Petition for Writ of Certiorari be denied.

Dated: October 9, 1996

Respectfully submitted,

David A. Senior*
CONDON & FORSYTH
1900 Avenue of the Stars
Suite 650
Los Angeles, California 90067
Telephone: (310) 557-2030
Attorneys for Respondent
Michael A. Morales

* Counsel of Record

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is 1900 Avenue of the Stars, Suite 650, Los Angeles, California 90067.

On October 9, 1996, I served the foregoing document described as **RESPONDENT'S BRIEF IN OPPOSITION** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

Daniel E. Lungren, Attorney General
Keith H. Borjon, Supervising Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013

[X] **(By Mail)**: I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[ ] **(By Mail)**: As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after deposit for mailing in affidavit.

[ ] **(By Personal Service)** I caused such envelope to be delivered by hand to the offices of the addressee above.

[ ] **(State)**: I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] **(Federal)**: I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 9, 1996, at Los Angeles, California.

CYNTHIA KELLEY

ORIGINAL

ORIGINAL

No. 96-355

Supreme Court, U.S.
FILED
NOV 4 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Arthur Calderon, Petitioner

v.

Michael Angelo Morales, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE; SUPPLEMENTAL BRIEF IN OPPOSITION

David A. Senior*
CONDON & FORSYTH
1900 Avenue of the Stars
Suite 650
Los Angeles, California 90067
Telephone: (310) 557-2030
Attorneys for Respondent
Michael A. Morales

* Counsel of Record

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES . . . . . ii-iii

I. THERE ARE NO CONFLICTS IN THE COURTS BELOW . . . 2

II. THERE ARE NO CONTRADICTIONS IN THIS COURT'S EARLIER OPINIONS 8

III. DRACONIAN STATE PROCEDURAL RULES ARE NOT REQUIRED TO ENSURE THEIR CONSISTENT APPLICATION BY THE STATE COURTS 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES	PAGE
Barr v. Columbia, 378 U.S. 146 (1964)	3, 4
In re Clark, 5 Cal. 4th 750 (1993)	5
Dugger v. Adams, 489 U.S. 401 (1989)	8
Harris v. Reed, 489 U.S. 255 (1989)	10, 11
Hathorn v. Lovorn, 457 U.S. 255 (1982)	8, 9
Howlett v. Rose, 496 U.S. 356 (1990)	4
Johnson v. Mississippi, 486 U.S. 578 (1988)	4
Michigan v. Long, 463 U.S. 1032 (1983)	10
Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990)	passim
State v. Willis, 69 Wis. 2d 489, 230 N.W.2d 827 (1975)	4
Ylst v. Nunnemaker, 501 U.S. 797 (1991)	10

STATUTES

Wis. Stat. § 974.06(4)	3

COMES NOW respondent, Michael A. Morales, by and through his attorneys of record, David A. Senior, CONDON & FORSYTH, and hereby opposes the motion of the Criminal Justice Legal Foundation for leave to file a brief amicus curiae. The request to appear amicus curiae should be denied because its brief is devoted almost entirely to issues not presented by this case and is intended only to obfuscate those which are properly before this Court. Amicus curiae additionally relies on disputed facts not raised or litigated below, which, being raised too late, find no factual support in the record.

In the alternative, Morales submits this pleading as a supplemental brief in opposition to address the new issues argued for the first time in the brief amicus curiae. See Rule 15.7.

I

THERE ARE NO CONFLICTS IN THE COURTS BELOW

Amicus curiae's first argument is that certiorari should be granted to resolve an alleged inter-circuit conflict. See Brief of Amicus Curiae at 3-5. This argument is premised entirely on the contention that the instant case is distinguished from Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990), only

by its alleged contrary result. Amicus curiae is, quite simply, wrong. Prihoda involved a very different set of legal and factual issues, ones not present in this case.

The issue in Prihoda was whether the mere existence of a "good cause" exception to a clear state procedural requirement automatically violated the "strict adherence" formulation of the adequate and independent state ground doctrine articulated by Barr v. Columbia, 378 U.S. 146 (1964). The petitioner in Prihoda had violated the straightforward state-law procedural requirement, contained in Wis. Stat. § 974.06(4), that "all grounds for relief available to a prisoner . . . must be raised in his original, supplemental or amended motion [for collateral relief]." Prihoda v. McCaughtry, 910 F.2d at 1381. The petitioner's second motion for collateral relief was denied on procedural grounds, notwithstanding petitioner's contention that his pro se status during the prior proceeding constituted "good cause" for a successive motion for collateral relief.

In the Seventh Circuit, the petitioner relied on Barr v. Columbia, 378 U.S. 146 (1964) to argue that the existence of a "good cause" exception to the rule rendered its enforcement insufficiently "strict" to constitute an adequate and independent state ground for decision. In the alternative, petitioner set

forth a single example from ten years earlier, State v. Willis, 69 Wis. 2d 489, 230 N.W.2d 827 (1975)(a second motion for collateral relief was entertained partially because the first motion had been filed pro se), to attempt to demonstrate that the state court had failed to administer the exception evenhandedly.

Despite amicus curiae's emphatic assertions, there is no disagreement between the Ninth and Seventh Circuits. The Seventh Circuit's general view of the adequate and independent state ground doctrine, as expressed in Prihoda, is entirely consistent with the Ninth Circuit's:

> A state ground is "adequate" only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted.

Prihoda, 910 F.2d at 1383 (citing Johnson v. Mississippi, 486 U.S. 578 (1988); Barr v. Columbia, 378 U.S. 146 (1964); Howlett v. Rose, 496 U.S. 356 (1990)). Furthermore, there is nothing in the instant case that suggests the slightest disagreement with Prihoda's view that "[a] rule of forfeiture-unless-good-reasons may be 'strictly' followed when the state is scrupulous about treating particular reasons as 'sufficient' routinely and others as insufficient with equal regularity." Id. at 1384.

Morales demonstrated below (as well as in his Brief in Opposition filed in this Court) that the routine practice of the California Supreme Court, until the decision in his case, was to treat all petitions involving the circumstances of the instant case as timely filed. Unlike the Prihoda petitioner's reliance on a single deviation from the state-court rule (based only in part on his own similar circumstances), Morales's showing is supported by an examination of California Supreme Court rulings in every state court petition filed under similar circumstances.

That showing led below to the inescapable conclusion that the state court's application of the timeliness guidelines was entirely without rhyme or reason.[1] Indeed, the very day after the denial of Morales's claims for habeas corpus relief, the California Supreme Court stated that "no clear guidelines" could be discerned from its prior application of its habeas policies. In re Clark, 5 Cal. 4th 750, 763 (1993). The state no longer makes any contention to the contrary.

Amicus curiae would have this Court believe that the

---

[1] Similar showing led numerous district courts to the same conclusion, well before the Ninth Circuit's decision. See, e.g., Murtishaw v. Vasquez, CV-F-91-508-OWW (E.D. Cal. Feb. 19, 1993); McDowell v. Vasquez, CV-90-4009-MRP (C.D. Cal. Apr. 8, 1993); Kimble v. Vasquez, CV-90-4826-SVW (C.D. Cal. Aug. 2, 1993); Allen v. Calderon, CV-S-88-1123-DFL (E.D. Cal. Sept. 30, 1994).

application of the state-court timeliness guidelines in this case were found "inadequate" simply because they admit to certain "good cause" exceptions. Little could be further from the truth.

California clearly has no "rule" in any traditional sense regarding the time for filing petitions for writs of habeas corpus. At the time of Morales's state procedural default, California had, by the state supreme court's own admission, no clear guidelines regarding the timely filing of a petition for post-conviction relief. After disposition of Morales's appeal, the state adopted guidelines intended to require habeas petitions to be filed before disposition on an appeal. Pursuant to those guidelines, all petitions for writs of habeas corpus "should be filed without substantial delay." See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to such Petitions, 1-1. The absence of substantial delay "may [be] establish[ed]" by the allegation of specific facts "showing that the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim." Id. at 1-1.2. "A petitioner may establish good cause

[for substantial delay] by showing particular circumstances sufficient to justify substantial delay." Id. at 1-1.2. "Any petition that fails to comply with these requirements may be denied as untimely." Id. at 1-3.

The essence of what these guidelines provide is that where a petition is filed more than 90 days after the filing of the reply brief in the automatic appeal (an event which in Morales's case predated the promulgation of the guidelines by several years), it will be treated as timely whenever the California Supreme Court determines, in an entirely subjective and post hoc fashion, that the filing occurred at an appropriate time. Thus, the issue in this case is not that argued by amicus curiae -- whether a clear and well-established procedure requirement becomes "inadequate" by a state court's discretion to forgive a default either for good cause shown or in the interests of justice.

Consequently, leave to file the brief amicus curiae should be denied. In the alternative, the Court should reject the arguments of amicus curiae by denying the petition for writ for certiorari.

II

THERE ARE NO CONTRADICTIONS IN THIS COURT'S EARLIER OPINIONS

The next section of amicus curiae's brief is an excursion through the alleged "fester[ing]" inconsistency between Hathorn v. Lovorn, 457 U.S. 255 (1982), and Dugger v. Adams, 489 U.S. 401 (1989). According to amicus curiae, certiorari should be granted to repudiate Hathorn's requirement of evenhanded application to "all similar claims," see Hathorn v. Lovorn, 457 U.S. at 263 (emphasis added), and to substitute, in its stead, Adams's more flexible requirement of evenhanded application in the "vast majority of cases," see Dugger v. Adams, 489 U.S. at 411 n.6.

Notably absent from amicus curiae's argument is any suggestion that disposition of this case in any way depends on the distinction between "all" and "most," and for good reason. As was demonstrated by Morales below, the California Supreme Court's treatment of questions of timeliness is uneven by any definition. Morales never contended below that the mere existence of good cause exceptions rendered the guidelines inadequate, and he specifically acknowledged Adams's holding

regarding the permissibility of occasional exceptions to the rule.

The simple fact is that in the vast majority of cases similar to Morales's, the California Supreme Court found petitions timely filed. Amicus curiae's observations regarding the alleged conflict between Hathorn and Adams are wholly irrelevant.

The remainder of the second section of the brief amicus curiae consists of various musings on different reasons a court may choose not to overlook a potential procedural bar. The issue amicus curiae seeks to raise thereby is extremely unclear, but its intent apparently is to take Morales to task for failing to compare his case to all procedurally similar cases in which relief was granted.[2] According to amicus curiae, "common sense" requires us to ignore cases in which a potential default was forgiven (either implicitly or explicitly) in order to reach, but nevertheless reject, the merits of the claims. Thus, contends

---

[2] A frequent amicus curiae in California cases, the Criminal Justice Legal Foundation presumably is aware of the impossibility of this task. The California Supreme Court never has granted a post-affirmance habeas corpus petition in a capital case since the death penalty was reinstated in California in 1977. In contrast, it has denied over 160 such petitions, many explicitly on the merits, despite delays vastly exceeding that in the instant case.